

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

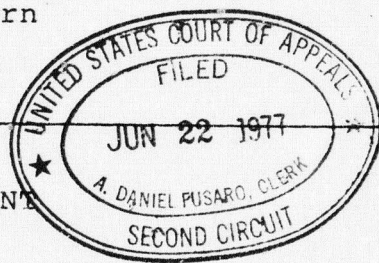
-vs.-

RAYMOND DAVID WEAN,

Defendant-Appellant.

On Appeal From the United States
District Court for the Eastern
District of New York

BRIEF FOR DEFENDANT-APPELLANT



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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED BY ITS DENIAL OF THE DEFENDANT'S MOTION FOR A MISTRIAL RELATIVE TO THE PROSECUTOR'S FAILURE TO TIMELY DISCLOSE EXCULPATORY EVIDENCE.

II. WHETHER THE TRIAL COURT ERRED BY ITS DENIAL OF THE DEFENDANT'S MOTION FOR A MISTRIAL RELATIVE TO THE PROSECUTOR'S LEADING QUESTIONS CONCERNING THE DEFENDANT'S PREVIOUS ARRESTS.

PRELIMINARY STATEMENT

The defendant-appellant, Raymond David Wean, appeals from a judgment of the United States District Court of New York, (Judge Edward Neaher and a jury), adjudging the defendant-appellant guilty as to Count Two in that on or about the 11th day of March, 1975, within the Eastern District of New York, the defendants JOSEPH MASSINO and RAYMOND WEAN did willfully and unlawfully receive and have in their possession approximately two hundred twenty-five cartons of miscellaneous goods having a value in excess of One Hundred (\$100) Dollars, which goods had been stolen from Hemingway Transport, Inc., while moving as a part of and constituting an interstate shipment of freight from Georgia, Maine, Maryland, Massachusetts, North Carolina, Rhode Island, South Carolina and Virginia to New York, the defendants JOSEPH MASSINO and RAYMOND WEAN knowing the same to have been stolen, in violation of Title 18, United States Code, Section 659 and Section 2.

Defendant-appellant Wean was sentenced to three (3) years.

The defendant-appellant is on bail pending the appeal.

STATEMENT OF FACTS

The trial in this matter began on November 22, 1976. On that day, Stephen Morrill, an F.B.I. agent, testified (Appendix page 16a). Mr. Marks, the Government prosecutor, purportedly provided the defense with all 3500 materials pertaining to said witness.

The morning of the following day, defense counsel brought to the attention of the Court that it seemed that he had only been given partial testimony of the witness (Appendix page 11a). Mr. Marks admitted that there was additional previous testimony and reports of the witness. However, he did not disclose that such testimony existed because he had decided, ex parte, that it was not 3500 material (Appendix page 11a). The trial court ordered that all material relating to the subject matter of the trial be furnished to the defense (Appendix page 12a)

This additional material contained an F.B.I. report of an interview with a Mr. Frank Koerner (Appendix page 9a).

In substance, this report stated that on March 11, 1975, Koerner, a truck driver, received a radio communication in his truck pertaining to a stolen tractor trailer. Soon afterward, he observed said stolen trailer, notified his dispatcher, and kept the trailer under observation. The report does not contain any description of the driver of the trailer. However, Mr. Koerner was shown a spread of ten photographs, which included one of the defendant. Koerner failed to identify any of the photographs.

When defense counsel indicated he might wish to call Mr. Koerner as a defense witness, Mr. Marks, apparently already aware of Mr. Koerner's existence and availability, informed the defense that Mr. Koerner was "in no position to be called in view of the fact that he has just come out of the hospital after having a lung removed. He is not available to us except by way of deposition and I am not sure he is in any condition...". (Appendix page 13a and 14a).

The Court asked Mr. Marks specifically whether "it is your information that it would be futile to attempt to interview him at this juncture." (Appendix page 15a). Mr. Marks answered unequivocally: "That is correct." (Appendix page 15a).

During the luncheon recess, a telephone call was placed to Mr. Koerner. After the recess, Mr. Marks reported that: "Mr. Weiswasser just called Mr. Koerner and spoke to him. Apparently he's too sick to come into Brooklyn. My information, I get it from Agent Morrill, is that since Mr. Koerner got out of the hospital, he has not traveled more than five minutes away from his house." (Appendix page 20a).

Mr. Marks suggested that a deposition of Mr. Koerner be taken on the telephone (Appendix page 20a).

Although the defense counsel stated that he had no objection to Mr. Marks' suggestion, he pointed out that defense counsel had already asked of Mr. Koerner if someone could come to his home to depose him; Mr. Koerner had advised that he was taking pain killers and tranquilizers; furthermore, he advised that he

was uncomfortable talking on the telephone (Appendix page 21a).

Defense counsel pointed out other problems involved in taking a deposition by telephone, e.g. legality of swearing a witness over the telephone, the witness' medical condition, answers which are unresponsive or volunteered, etc., and asked guidance from the Court. The Court stated that: "I don't believe that a deposition by telephone under no circumstances seems feasible to me...", and in effect, ruled out the taking of a deposition by telephone (Appendix page 21a:).

On November 24th, a stipulation regarding Mr. Koerner was agreed upon between the Government and defense counsel (Appendix page 32a-35a). However, defense counsel made it clear that this stipulation was not curative of Mr. Marks' failure to furnish Mr. Koerner's statement before the second day of trial (Appen. page 28a-29a), and accordingly moved for a mistrial. (Appendix page 31a).

Although Mr. Marks stated that he was willing to travel to the home of Mr. Koerner, Mr. Weiswasser pointed out that in Mr. Koerner's physical condition, he was in no position to concentrate on the problems concerned with this trial (Appendix page 29a-30a).

Furthermore, as stated previously, Mr. Koerner had stated that because of his condition, he was taking tranquilizers and pain killers. (Appendix page 20a).

The Court denied the motion for a mistrial.

During the deliberations of the jury, the jury requested the stipulation concerning Mr. Koerner and the F.B.I. report of Mr. Koerner's statement (Appendix page 36a) .

It is noteworthy that Agent Colgan did not observe the hijacking. He testified that on the morning of March 11, 1975, he received a radio transmission as a result of which he proceeded to the vicinity of Maspeth and Rust Street in Maspeth, Queens. He arrived at approximately 9:45 a.m. (Appendix page 38-1a), and observed the stolen tractor trailer parked on Rust Street (Appendix page 38a). At the time he arrived, there was no one in the tractor trailer (Appendix page 38a). He passed the tractor trailer and parked on Rust Street, south of Maspeth so as to observe the tractor trailer in his side view mirror (Appendix page 39a). The tractor trailer was on the opposite side of the street facing the opposite way at a distance of approximately 150-200 feet (Appendix pages 39a-40a). At approximately 10:00 to 10:15 a.m. he observed an individual he later identified in the courtroom as the defendant, come from a diner and enter the tractor portion of the truck with his back toward Agent Colgan (Appendix page 41a).

Agent Colgan testified that he did not see the face of the man entering the trailer at this time (Appendix page 42a). He further testified that shortly thereafter, the truck proceeded north on Rust Street, made a U-turn and proceeded in the opposite direction (Appendix page 43a). Agent Colgan followed. Allegedly, a blue Cadillac came directly behind the trailer and pulled alongside the trailer at a stop light at which time the occupants of both vehicles appeared to be in conversation (Appendix page 44a). The trailer made a right turn and proceeded along the street and

parked (Appendix page 45a), at which time the driver of the trailer came toward Agent Colgan for a few steps, reversed himself and proceeded along the sidewalk away from Agent Colgan (Appendix page 45a).

Agent Colgan arrested Raymond Wean walking on the sidewalk. Upon being informed he was arrested for driving a stolen tractor trailer, Mr. Wean denied that he was in any such vehicle (Appendix pages 45a and 46a).

Agent Colgan's only observation of the face of the driver of the tractor trailer was at approximately 50 to 75 feet (Appendix page 43a) for a mere two to three seconds (Appendix page 43a) as the driver made a U-turn and proceeded past Agent Colgan (Appendix page 43a); and for a few seconds when the driver parked the trailer and walked toward Agent Colgan for a few steps before the driver reversed himself and walked in the opposite direction (Appendix page 45a). Moreover, Agent Colgan did not arrest the driver of the tractor trailer in the trailer. Instead, he arrested Mr. Wean walking on the sidewalk. Thus, even viewing the Government's proof in its best light, it is highly questionable whether Mr. Wean was the individual in the trailer.

Agent Colgan's testimony is even more questionable in light of Mrs. Wean's testimony (see Point II), and the testimony of Christopher Rudan, who testified that on March 11, 1975, shortly after 9:00 a.m., Mr. Wean received a phone call from his ex-wife as a result of which Mr. Wean asked Ms. Ruden to drive him to his ex-wife's house. (Appendix page 47-49a). On the way an argument

ensued whereupon at approximately 10:30 a m. Mr. Wean got out of the car at approximately on the corner of 54th Street and Grand Avenue -- the location where he was arrested (Appendix pages 50a-54a).

Even the trial judge had doubts as to the credibility of Agent Colgan, or at least the possibility of a mistake. At one point in the trial, the Court stated:

"...I'm not satisfied in my own mind heree with this agent. He's a nice looking man and all that. There is also a possibility of mistake here...".
(Appendix pages 55a-56a).

POINT ONE

THE TRIAL COURT ERRED BY ITS DENIAL OF THE
DEFENDANT'S MOTION FOR A MISTRIAL RELATIVE
TO THE PROSECUTOR'S FAILURE TO TIMELY DIS-
CLOSE EXCULPATORY EVIDENCE.

It is respectfully submitted that the prosecution failed to disclose exculpatory evidence until November 23, 1976, the second day of trial over one and one-half years after the incident in question and one and one-half years after the date the exculpatory evidence was known.

The exculpatory evidence in question was the existence of an eyewitness to the flight of a driver of a stolen tractor trailer. The eyewitness was Frank Koerner. On March 12, 1975, Koerner stated to the F.B.I. that on the previous day, while working as a truckdriver, he received a radio communication that a Hemmingway Transportation Company tractor trailer had been stolen, trailer number 1155, tractor number 897. While proceeding to a delivery in Maspeth, Koerner observed this same tractor trailer parked at a diner on Rust Street and Maspeth Avenue. He reported this to his employer who notified the F.B.I. He observed the license plate of both the trailer and the tractor as being the same as was broadcasted on his radio as being stolen. He parked for approximately 300 feet away from the tractor. Approximately 15 minutes later, he observed an individual get into the cab of the tractor and proceed past Koerner's truck. Allegedly, he stated that he did not get a "good" look at the driver. In

fact, he was shown photographs of the defendant and others. He did not identify any of the individuals, including the defendant, as being the driver of the tractor trailer. He also stated that he did not see any other vehicles around the tractor trailer, although Agent Colgan had testified that he was in the immediate vicinity and within 150 feet of said tractor trailer at the same time (Appen. page 17a-19a). In what can only be described as an extremely unusual F.B.I. report, there is nothing in the report concerning Mr. Koerner's statement which would describe in a general manner the individual which he saw. For instance, it seems quite unbelievable that Mr. Koerner was not asked by the F.B.I. whether the driver was white or black, heavy or thin, bald or with hair, tall or short, etc.

However, after the prosecutor was forced, over objection, to furnish the report on Koerner's statement, Mr. Koerner was called on the phone by counsel for the Government and for the defense. He stated at the time that the driver was of medium build (approximately 150 to 190 pounds) and was about 5'7" to 5'10" tall. Although he stated that he did not see the driver that closely, he did state that the driver definitely did not weigh as much as 250 pounds. This became a stipulation read into evidence (Appendix page 32a-35a).

Mr. Koerner was not available as a witness because he had just been released from the hospital after a serious operation in which his lung was removed (Appendix page 20a). The Government prosecutor was aware of Koerner's medical condition (Appendix

pages 13a-14a). When Mr. Koerner's report was given to the defense, Mr. Marks stated immediately: "By the way, he is in no position to be called in view of the fact he has just come out of the hospital after having a lung removed. He is not available to us except by way of deposition and I am not sure he is in any condition...". (Appendix page 13a-14a).

It was, therefore, Mr. Mark's duty to turn Mr. Koerner's statement over to the defense as soon as possible. Nevertheless, the prosecutor failed to inform the defense or the Court of Mr. Koerner's existence or his statement. In fact, because of his condition, Mr. Koerner was not even available to be interviewed in person (Appendix page 20a). Therefore, although he had given a description of the driver of the tractor trailer, he was not available to view the defendant in Court. As stated previously, he had been shown a photograph of the defendant and had failed to identify him. If Mr. Koerner could have viewed the defendant, it is certainly reasonable to assume that Mr. Koerner could have stated unequivocally that the defendant was not the driver on the basis of the defendant's very large size and heavy weight. [Even Agent Colgan described the defendant on the day of his arrest as 6'1" and 280 pounds (Appendix page 57a).]

The failure of the prosecution to reveal the aforementioned exculpatory evidence is crucial because the identity of the defendant as the tractor trailer driver was the main issue of the case. Agent Colgan's identification of the defendant was uncorroborated [The jury was obviously troubled by the issue because it requested that the stipulation concerning Mr. Koerner's statement be read to them (Appendix page 36a-37a)] .

The defendant was entitled to have Mr. Koerner as his witness. Furthermore, he was entitled to sufficient time to interview Mr. Koerner on an extensive basis. Unfortunately, during the trial, Mr. Koerner was on tranquilizers and pain killers and was never in a position to give his full statement to matters concerning the trial (Appendix pages 20a, 29a-30a).

In light of Mr. Koerner's physical condition, it was the prosecutor's duty to inform the defense of Mr. Koerner's statement as soon as possible. As this brief will show, if the Government had any doubts as to Mr. Koerner's statement being exculpatory material, its remedy was to seek a pretrial ruling from the Trial Court. Its unilateral decision to withhold such documents for over a year and a half until the middle of the trial and even longer had not the Court forced the Government to turn over the statement as 3500 material was an invitation for a reversal.

It should be noted that prior to trial, counsel for the defense orally requested any exculpatory information from the prosecution. The defense was informed there was no exculpatory material. [This fact was asserted by defense counsel in its memorandum of law submitted on this issue. It was never rebutted by the Government.]

The applicable law in the instant case is as follows:

The recent development of the prosecutor's constitutional duty to disclose evidence favorable to the defendant may be said to have begun in 1935 with Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, where the Supreme Court stated that "a deliberate

deception of court and jury by the [State's] presentation of testimony known to be perjured", was a denial of due process.

In Brady v. State of Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), the Supreme Court made it clear that its primary interest was not to punish misconduct by the prosecutor, but to insure a fair trial to the defendant. Brady shifted the emphasis away from the willfulness of the prosecutor; instead, the Supreme Court held that any suppression by the prosecution of evidence favorable to an accused violates due process irrespective of the good faith or bad faith of the prosecution.

Thereafter, federal cases emphasized the harm to the defendant rather than the prosecutor's motive in failing to disclose exculpatory evidence. The fact that the Government concludes, in good faith, that evidence would not be very helpful to the defendant does not excuse the failure to disclose exculpatory material. U.S. v. Miller, 529 F.2d 125.

In U.S. v. Bryant, 439 F.2d 642, on remand, 331 F.Supp. 927, aff'd 488 F.2d 1182, the Court stated that the purpose of the duty of the prosecutor to disclose evidence to the defense is not simply to correct an imbalance of advantage where the prosecution may surprise the defense at trial with new evidence; rather, it is to make of a trial a search for truth informed by all relevant material, much of which, because of an imbalance in investigative resources, will be exclusively in the hands of the Government.

A request by the defense for exculpatory material is not necessary. U.S. v. Wolfson, 322 F.Supp. 798, aff'd 454 F.2d

60, cert. den. 92 S.Ct. 792. The test promulgated by the United States Supreme Court and Second Circuit is whether the material is of such an exculpatory nature that it "in any reasonable likelihood (would) have affected the judgment of the jury." Napue v. Illinois, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178 (1959); U.S. v. Brawer, 496 F.2d 703, 704, cert. den. 95 S.Ct. 628.

Where the exculpatory evidence is in the nature of a witness, the Court in U.S. v. Wolfson, supra, 322 F.Supp. at 820, stated two elements are necessary: (1) That the potential witness is competent to testify, and (2) That the witness possessing material, relevant evidence have some tendency to aid the defendant's case.

In Levin v. Clark, 408 F.2d 1209, the Court stated that the prosecution must reveal evidence to the defense which might lead the jury to entertain a reasonable doubt concerning the defendant's guilt.

The Government is not only obliged to disclose pertinent evidence as to matters of substance, but to matters relating to credibility of Government witnesses. U.S. v. Gerard, 491 F.2d 1300.

In a substantially similar fact pattern to the instant case, the United States Court of Appeals for the Fifth Circuit in Jackson v. Wainwright, 390 F.2d 288 (Fifth Cir.) ordered the case reversed and remanded. The witness, a Mrs. Elberty, gave a statement to the police which stated, in part, that "I did not get a good look at the boy who was with her (the victim). I could not identify him." However, Mrs. Elberty stated that she

had no doubts that the assailant's skin was lighter. Subsequently, Mrs. Elberty told the prosecutor that, having seen both rape victim and the defendant, she could positively identify the girl as the one she had seen on the evening in question, but she believed that the defendant's complexion was too dark to have been the man she saw struggling with the girl. In the opinion for the Fifth Circuit, Judge Wisdom held that the prosecutor was under a duty to disclose Mrs. Elberty's statements to the defendant and further held that the furnishing of the witness' name and address was insufficient where the prosecution failed to disclose the statements of the witness or that she possessed information of an exculpatory nature. Judge Wisdom quoted from Canon 5 of the American Bar Association Canons of Professional Ethics that:

"The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing innocence of the accused is highly reprehensible."
(Emphasis added)

It should be noted that the duty of disclosure of exculpatory evidence affects not only the prosecutor, but Government as a whole, including its investigatory agencies, e.g. information supplied to F.B.I., U.S. v. Bryant, supra, 439 F.2d 642, on remand 331 F.Supp. 927, aff'd 448 F.2d 1182.

Moreover, the disclosure by the Government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pretrial

disclosure. U.S. v. Pollack, 534 F.2d 964.

Even leads to relevant evidence cannot be withheld from the accused. U.S. v. Bowles, 488 F.2d 1037, cert. den. 415 U.S. 991.

In the instant case, although it was reported by the F.B.I. that the potential witness, Frank Koerner, did not get a good look at the driver of the stolen tractor trailer, as in Jackson v. Wainwright, supra, it was noted that Mr. Koerner had stated that he noted the trailer number 1155 and the tractor number 897 as being identical to the reported stolen vehicle announced on his radio. Furthermore, Koerner was shown a photograph of the defendant and stated that he could not identify him as the driver of the stolen vehicle. Also, he stated that the driver did not weigh as much as 250 pounds.

Considering the fact that the instant case involved only one witness for the Government and that there was no corroborating evidence as to the defendant being the individual who was the individual in the tractor trailer, there can be little doubt that the testimony of Frank Koerner was "a lead to relevant evidence" which should not have been unilaterally suppressed by the prosecutor. If the prosecutor had any doubts as to whether or not such evidence needed to be disclosed, he should have submitted the evidence to the trial judge for an in-camera inspection.

Also, there can be little doubt that the belated and begrudged submission to the defense of the 3500 material of Steven Merrill relating to Frank Koerner was too late for the defense "to allow the defense to use the favorable material

effectively in the preparation and presentation of its case" as required by U.S. v. Pollack, supra, 534 F.2d 964.

A similar case in the Second Circuit is U.S. ex. rel. Meers v. Wilkins, 326 F.2d 135 (2nd Cir., 1964). Meers had been convicted of first degree robbery over his defense of alibi. Two witnesses who had observed the crime told the police shortly after the event that they had seen the three men who committed the robbery and that Meers was not one of them. Neither person was called as a witness at the trial, and the defense was not told about them. The witnesses who did testify positively identified Meers as one of the robbers. Meers moved in State Court for a new trial which was denied. The Federal District Court held that the suppression was a denial of due process. The Second Circuit affirmed this judgment. Judge (now Mr. Justice) Marshall stated that " it is hard for us to think of any other testimony that might have been more helpful to the defense in establishing its case." U.S. ex. rel. Meers v. Wilkins, supra, 326 F.2d at 138.

The Court in U.S. ex. rel. Meers v. Wilkins, supra, cited the case of Application of Kapatos, 208 F.Supp. 883, (S.D. N.Y., 1962), that also involved the nondisclosure of an eye-witness whose observations conflicted with the prosecution's case. The withheld testimony was that of a Mr. Danise who heard shots being fired on the street below, looked out and saw two men jump into a car proceeding along the street. The inferences created at the trial were that one of these two men had committed the

murder in question. Mr. Danise had stated that the defendant was not one of the two men whom he saw running to the auto.

Judge Palmieri held that:

"At the very least, the trial judge should have been made aware of this evidence, and a ruling should have been requested by the prosecutor with respect to his duty in the premises. His unilateral decision to keep the evidence undisclosed invited the risk of error." 208 F.Supp. at 888.

Another test promulgated by the Second Circuit regarding the disclosure of exculpatory material is that when the prosecution has been negligent in failing to make constitutionally mandated disclosures, a new trial should be granted if "there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." Grant v. Alldredge, 498 F.2d 376, 380 (2nd Cir., 1974); U.S. v. Pfingst, 490 F.2d 262, 277 (2nd Cir., 1973); U.S. v. Miller, 411 F.2d 825 832 (2nd Cir., 1969) (Friendly, J.).

Furthermore, the test is measured by the effect of the suppression upon the defendant's preparation for trial rather than its effect upon the jury's verdict. Grant v. Alldredge, supra, 498 F.2d at 376; U.S. v. Polisi, 416 F.2d 573, 577 (2nd Cir., 1969). In Grant v. Alldredge, an eyewitness selected a person other than the defendant as the person most closely resembling the bank robber. The Government disclosed that the eyewitness had failed to identify the defendant, but failed to disclose that the eyewitness had picked another person. The Second Circuit held that this was insufficient disclosure and a violation of the

defendant's right to due process. Moreover, the Court indicated that such discovery should be made prior to trial in order to give sufficient time to the defense to investigate, to seek witnesses or documents.

This theme of early disclosure runs throughout the aforementioned cases. As stated in U.S. v. Cobb, 271 F.Supp. 159, 163 (S.D.N.Y., 1967):

"[T]hese may be instances where disclosures of exculpatory evidence for the first time during trial would be too late to enable the defendant to use it effectively in his own defense, particularly if it were to open the door to witnesses or documents requiring time to be marshalled and presented."

In U.S. v. Henry, 528 F.2d 661, (D.C. Cir., 1976) it was held that reversible error occurred where defendant's counsel was not notified or furnished with the results of a mental examination of the defendant until the day of trial and was, therefore, unable to sufficiently prepare an insanity defense.

The instant case is the quintessential example of an occasion when a disclosure was not sufficiently timely to enable the defense to obtain the potential witness, Frank Koerner. Frank Koerner was unable to be produced as a witness or even to be interviewed in person because of his illness.

The Government knew of his medical condition. It was, therefore, incumbent upon the Government to disclose the fact that Mr. Koerner existed, his address and the nature of his eyewitness knowledge to the defense as early as possible. If this was done, defense could have requested an early trial before Mr. Koerner underwent hospitalization. If the prosecution had any doubts as

to whether Mr. Koerner's statement was exculpatory within the meaning of Brady v. Maryland, his duty was to ask for a pretrial ruling from the trial judge.

As stated by Judge Palmieri, in Application of Kapatos, supra, "His unilateral decision to keep the evidence undisclosed invited the risk of error." The Second Circuit in Grant v. All-dredge, made it clear that "as the prosecutor's culpability increases from unavoidable nondisclosure to negligent nondisclosure to deliberate suppression, 'prophylactic considerations' designed to deter future prosecutorial misconduct begin to assume ascendant and eventually paramount importance." Grant, supra, 498 F.2d at 380-381. In the instant case, the prosecutor knew of the interview with Koerner. Therefore, the suppression of said statement was neither mistake nor negligence.

Two other cases worthy of note are U.S. v. Hibbler, 463 F.2d 455 (Ninth Cir., 1972) and Lee v. U.S., 388 F.2d 373 (Ninth Cir., 1968). In Hibbler, an eyewitness observed the defendant aiding the main witness in the case, an accomplice to the crime, starting an automobile which had been used in a robbery. This was in contradiction to the testimony of the main witness. The Government failed to disclose this to the defense. The Court reversed the conviction even though the prosecutor stated he did not think the evidence was material. In Lee, the Government failed to disclose the identity of an eyewitness who had observed a flight from the scene of the crime, to wit: a person vaulting a high fence behind the bank. The prosecutor stated that the reason he withheld such information is that the witness was a con

year old boy who was not positive whether he ran down the alley, up the alley or jumped over the fence. The Government held the defendant was entitled to a new trial.

In all of the aforementioned cases, it did not matter if the defense had not requested exculpatory material. In the instant case, there was a request for exculpatory material. The reply was that there was no exculpatory material.

POINT TWO

THE TRIAL COURT ERRED BY ITS DENIAL
OF THE DEFENDANT'S MOTION FOR A MISTRIAL
RELATIVE TO THE PROSECUTOR'S LEADING
QUESTIONS CONCERNING THE DEFENDANT'S
PREVIOUS ARRESTS

On November 23, 1976, the defendant-appellant's former wife, Dorothy Wean, testified for the defendant that she had called the defendant-appellant a little after nine o'clock at his home in Maspeth, Queens, on March 11, 1975, and had requested his assistance with their son who was boisterous in school. (App p 22a-23a) She remembered the particular day because it was her anniversary date. (App p 24a) On recross, the Assistant United States Attorney, Jonothan Marks, unexpectedly asked the following leading question:

"This wasn't the first time your husband was arrested, was it?" (App. p. 24a).

Counsel for the defendant immediately objected and moved for a mistrial. (App p. 24a) Mr. Marks argued that:

"All I'm trying to do is establish that fact that he was arrested many, many times and accordingly there's nothing very special of March 11." (App. p. 25a).

The Court denied the motion for a mistrial, (App. p. 26a), and instructed the jury as follows:

"Members of the jury, I'm going to instruct you to erase from your minds the last question by Government counsel. People are arrested for many things. Some of them quite inconsequentially and many times, with no foundation as we all know.

It is not something that you should allow to remain in your minds in connection with your consideration on the evidence in this case. I'm trying to impress on you as firmly as I can." (App. p. 26a).

Counsel for the defendant, apparently concerned that the trial court's instruction was worsening the situation by impliedly admitting that the defendant had, in fact, been arrested in the past, requested the Court further instruct the jury "that the fact the question was asked is not evidence that he was arrested." (App p 28a) The Court then further instructed the jury that:

"Also it goes without saying that the mere fact that the defendant was asked is no evidence that he was in fact arrested. Bear that in mind." (App. p 28a).

The applicable law of the case is, as follows: It is clear that the improper introduction of evidence of a defendant's past criminal record is grounds for a new trial. Furthermore, cautionary instructions will not cure the error. Marshall v. U.S., 360 U.S. 310 (1959); U.S. v. Tomaiolo, 249 F.2d 683 (2nd Cir., 1957); U.S. v. Jacangelo, 281 F.2d 574 (3rd Cir., 1960); Helton v. U.S., 221 F.2d 338 (5th Cir., 1955).

In U.S. v. Rinaldi, 301 F.2d 576 (2nd Cir., 1962), it was held that the denial of the defendant's motion for a mistrial after a question relating to the defendant's prior criminal record had been asked by the prosecutor of the defendant's wife, and answered in the affirmative, was error requiring reversal.

Even if the improper question is not answered, it has been consistently held that it is error to suggest by leading questions on cross examination of the defendant that he had participated in specific acts of criminal conduct, not resulting in convictions, other than those with which he was charged. United States v. Provoo, 215 F.2d 531, 536 (2nd Cir., 1954); Thurman v.

U.S., 316 F.2d 205 (9th Cir., 1963).

Also, all inquiries on cross-examination as to other arrests or indictments filed against the defendant are excluded. Michelson v. United States, 335 U.S. 469 (1948); Manley v. United States, 238 F.2d 221 (6th Cir., 1956); Echert v. United States, 188 F.2d 336 (8th Cir., 1951); Little v. United States, 93 F.2d 401 (1937); Coulston v. United States, 51 F.2d 178 (10th Cir., 1931); Havener v. United States, 15 F.2d 503 (1926); Coyne v. United States, 246 F.2d 120 (5th Cir., 1917); Glover v. United States, 147 F. 426 (8th Cir., 1906).

In Manley v. United States, supra, 238 F.2d at 222, the Court held:

"It is well settled that it is not permissible for the Government to show that a defendant has been accused of, arrested for, or indicted for a crime."

In Coyne v. United States, supra, 246 F. at 121, where the defendant's conviction was set aside, the Court stated the *raison d'etre* for the rule:

"...The fact that an unproven charge has been made against one has no logical tendency to prove that he has been guilty of any offense, or to impair the credibility of his testimony. An indictment is a mere accusation, and raises no presumption of guilt. On the contrary, the indicted person is presumed to be innocent until his guilt is established, by legal evidence beyond a reasonable doubt, in a court of competent jurisdiction... It is not uncommon for entirely innocent persons to be indicted. It would be a gross injustice to permit the fact of such a making of a charge to be used to the prejudice of the person against whom the unproved charge is made..."

In the instant case, Mr. Marks deliberately injected

Mr. Wean's prior arrest record into the case. The manner in which Mr. Marks chose to ask the question at issue did not necessitate a response; a response would have been redundant. Mr. Marks chose to frame his question in a leading manner in order to insinuate to the jury that he already knew the answer and that the answer should be obvious to the jury.

The charge by the trial court might well have worsened the situation. The charge implied that Mr. Mark's insinuation were true -- Mr. Wean did have a criminal arrest record. The importance of the trial court's instruction was to persuade the jury that not every arrest is of a serious nature.

It was not until defense counsel requested an additional charge that the trial court at last told the jury that the fact the question was asked did not necessarily mean that it was true. It is respectfully submitted that by this time, the damage was done -- the impression was inked indelibly in the minds of the jurors. It is difficult to believe that said question was not unfairly prejudicial to the defendant despite the instructions by the trial court.

The explanation of Mr. Marks merely reinforces the deliberateness of his departure from his duty to refrain from the use of improper methods to obtain a conviction. Mr. Marks admitted that he was, in fact, attempting to show that the defendant had been arrested many times in the past. He stated that his objective had been to show that March 11th was not a special day because it was not the only time the defendant had been arrested.

However, Mrs. Wean did not testify that she remembered the day because her former husband was arrested that day; she remembered March 11th because it was the anniversary of her marriage to Mr. Wean. (App. p 22a-24a) As stated by the trial court: "That's a coincidence of events, arrested on the date of his anniversary." (Appendix page 25a).

In United States v. Blanton, 520 F.2d 907 (6th Cir., 1975), the Court reversed the defendant's judgment of conviction of illegal possession of firearms where the prosecutor deliberately injected testimony of a Special Agent of the Bureau of Alcohol, Tobacco and Firearms concerning a wholly unrelated offense in which the defendant was allegedly involved -- that the agents were looking for guns because the defendant was under investigation for bank robbery.

Moreover, the Court held that since the testimony could have influenced the jury's decision or affected the substantial rights of the defendant, the error was not harmless and the conviction had to be reversed.

Where it cannot be clearly said that a prejudicial statement or question did not have a substantial influence on the judgment of the jury, it is the duty of the Court to set aside a conviction and grant a new trial. Kotteakos v. United States, 328 U.S. 750; Mickler v. Fahs, 243 F.2d 515 (5th Cir., 1957); Oliver v. United States, 202 F.2d 521, (6th Cir., 1953); United States v. Levi, 177 F.2d 827 (7th Cir., 1949); Middleton v. United States, 49 F.2d 538 (8th Cir., 1931).

Whether improper conduct of Government counsel amounts to prejudicial error depends, in part, on the relative strength of the Government's evidence of guilt. Where a case is close, prejudice cannot be avoided by mild judicial action; reversal is necessary to obviate the consequences of the prosecutor's departure from his duty to refrain from the use of improper methods to obtain a conviction. U.S. v. Jones, 482 F.2d 747.

In Kotteakos v. United States, supra, the Supreme Court said at page 764-765 of 328 U.S., at page 1248 of 66 S.Ct.:

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But, if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

In Oliver v. United States, supra, the defendant was on trial for passing a forged check. He originally entered a plea of guilty, but before trial changed his plea to "not guilty". On cross-examination, the District Attorney asked him if he had originally pleaded guilty, and subsequently pleaded not guilty. In reversing his conviction and remanding the case to the district court for a new trial, the Court of Appeals said at pages 522-523 of 202 F.2d:

"The attorney for defendant objected and requested the court to instruct the jury to disregard the statement of the Government Attorney. This the court did saying: 'I am going to instruct the jury to disregard that completely and not to permit it to enter into their deliberations. Whatever happened before Judge Shelbourne, it is clear from the record that a plea of not guilty was ultimately entered by the court to the three counts in the indictment. This man is entitled, under the Constitution and the laws, to a trial by jury and he is now receiving it, and I want to hear no more about it.' The attorney for the defendant moved the court to discharge the jury on the ground that the statement of the District Attorney was so prejudicial that, notwithstanding the admonition of the court, the harmful impression could not be removed from the minds of the jury.

"We are in accord with the position taken by appellant's attorney. Neither the immediate admonition of the District Judge to the jury to disregard the prosecuting attorney's question nor the subsequent charge could, in our judgment, remove the indelibly impressed fact from the minds of the jurors that the defendant had, upon a previous occasion, pleaded guilty to the charge upon which he was being tried. ***

CONCLUSION

WHEREFORE, the conviction of the defendant-appellant,
Raymond David Wean, should be reversed and a new trial ordered.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
 : ss
COUNTY OF NEW YORK)

BRIGID E. WHELAN being duly sworn, deposes and states:

That I am not a party to this action, am over 18 years of age and reside at Woodside, New York.

That on the 21st day of June, 1977, I served a copy of the within Brief for the Defendant-Appellant and Appellant's Appendix upon the United States Attorney for the Eastern District of New York at 225 Cadman Plaza East, Brooklyn, New York, 11201, the address designated for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Brigid E. Whelan
Brigid E. Whelan

Sworn to before me, this
21st day of June, 1977.

Harold Meyerson
Not. Public State of NY
No. 31 - 4619066
Qual in NY County
Comm. Expires Mar 30, 1979